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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 597

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

vs.

PETER G. TEN EYCK, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION AND MOTION TO ADVANCE.

TIMOTHY N. PFEIFFER,
WALTER E. HOPE,
Counsel for Appellant.

MILBANK, TWEED, HOPE & WEBB,
Of Counsel.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity.

No. 78-91

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Plaintiff,

against

PETER G. TEN EYCK, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK; KENNETH F. FEE, AS DIRECTOR OF THE DIVISION OF MILK CONTROL OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK; JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK,

Defendants.

STATEMENT OF BASIS UPON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE DECREE APPEALED FROM, AS REQUIRED BY SUPREME COURT RULE 12.

Pursuant to Supreme Court Rule 12, paragraph 1, Borden's Farm Products Company, Inc., the plaintiff in the

above entitled cause, files this its statement showing the basis upon which it contends that the Supreme Court of the United States has jurisdiction upon appeal to review the decree appealed from herein, as follows:

I.

The statutory provisions believed to sustain appellate jurisdiction are Section 345 of Title 28 of the United States Code (Judicial Code, Section 238, amended) and Section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended).

II.

The statute of the State of New York, the validity of which is involved in this cause, is Chapter 126 of the Laws of 1934 of the State of New York (Laws of New York, 1934, page 564) which adds a new Article 21 and a new Article 21-A to the Agriculture and Markets Law of said State, being Chapter 69 of the Consolidated Laws of said State. The said statute provides for the regulation of the purchase, sale and distribution of milk in the State of New York, and requires that the defendant Commissioner of Agriculture and Markets fix the minimum prices at which milk may be purchased and sold in the State. The only part of said statute the validity of which is involved in this cause is the last sentence of Section 258-q which reads as follows:

> "• • • It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised

trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

The orders adopted by the defendant Commissioner of Agriculture and Markets, the validity of which is involved in this cause, are Official Order No. 12 designating the plaintiff and certain other milk dealers as having well advertised trade names for the purposes of the section of the statute above quoted, and Official Order No. 74 fixing the minimum prices for the sale of fluid milk in bottles to stores and from stores to consumers in the City of New York and incorporating the provisions of the section of the statute above quoted.

III.

The decree appealed from was made on the 25th day of July, 1935, and entered on the 26th day of July, 1935.

IV.

The application for appeal was presented on the 15th day of August, 1935.

V.

This suit was instituted to restrain the defendants in their respective official capacities from enforcing the provisions of the section of the statute above quoted and the orders adopted by the defendant Commissioner of Agriculture and Markets pursuant thereto on the ground that said statute and orders were arbitrary, unreasonable, oppressive and discriminatory and were in violation of the Fourteenth Amendment to the Constitution of the United States in that they deprived the plaintiff of its property without due proc-

ess of law and in that they denied the plaintiff the equal protection of the laws; and further to enjoin the defendants from proceeding in any manner against the plaintiff or any other person, firm, corporation or association by reason of the purchase or sale by them of the plaintiff's fluid milk in bottles at a price as low as that at which the purchase or sale of fluid milk in bottles of any other milk dealer was authorized or permitted.

Equitable jurisdiction was established by reason of the inability of the plaintiff to obtain the license which it was required by law to obtain, unless the plaintiff should agree to comply with and obey the section of the statute complained of and the orders adopted pursuant thereto. Continuation of the plaintiff's business without first obtaining such license rendered the plaintiff and all milk dealers dealing with the plaintiff liable to the imposition of severe penalties and fines and the officers, agents and employees of the plaintiff and of such milk dealers liable to imprisonment.

A temporary restraining order was granted pending the determination of the suit enjoining the defendants from proceeding in any manner against the plaintiff or anyone dealing with the plaintiff by reason of the plaintiff continuing its business without obtaining the required license. A temporary injunction containing similar provisions was granted in an order entered on August 16th, 1935, pending the plaintiff's appeal to the Supreme Court of the United States.

The suit was commenced on April 26, 1934, and the plaintiff's application for an interlocutory injunction was heard before Honorable Learned Hand, Circuit Judge, Honorable Henry W. Goddard and Honorable Alfred C. Coxe, District Judges, specially sitting as a Statutory Court convened pursuant to the provisions of section 380 of Title 28 of the United States Code (Judicial Code, Section 266, amended).

By a decree entered on July 5, 1934, the plaintiff's application for an interlocutory injunction was denied and the bill of complaint dismissed (*Borden's Farm Products Co., Inc.*, v. *Baldwin*, 7 Fed. Supp. 352). Upon appeal to the United States Supreme Court the decree of the Statutory Court was reversed and the case remanded with the direction that the plaintiff's motion for an interlocutory injunction should be heard and determined, the case proceed to final hearing upon pleadings and proof, and the facts found and conclusions of law stated as required by Equity Rule 70½ (*Borden's Farm Products Co., Inc.*, v. *Baldwin*, 293 U. S. 194). The plaintiff thereafter filed an amended bill of complaint and its application for an interlocutory injunction was referred to Honorable Charles C. Burlingham, as Special Master, to hear and determine. The Special Master made findings of fact and conclusions of law and filed a report in which he recommended that an interlocutory injunction issue in accordance with the prayer of the amended complaint. The plaintiff's motion to confirm the report of the Special Master, and all exceptions filed thereto, were heard before the Statutory Court and thereafter, in conformity with an opinion delivered by Judge Hand, concurred in by the other members of the Court, a decree was made and entered overruling the conclusions of law of the Special Master, denying the plaintiff's application for an interlocutory and a permanent injunction and dismissing the bill of complaint upon the merits.

VI.

The cases believed to sustain appellate jurisdiction are as follows:

Clark v. *Poor*, 274 U. S. 554 (1927);

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245 (1928);

Herkness v. *Irion*, 278 U. S. 92 (1928);
Borden's Farm Products Co., Inc. v. *Baldwin*, 293 U. S. 194 (1934).

Dated August 16, 1935.

MILBANK, TWEED, HOPE & WEBB,
15 *Broad Street, New York, N. Y.*,
Solicitors for Plaintiff.

TIMOTHY N. PFEIFFER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 597

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

PETER G. TEN EYCK, AS COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK; KENNETH F. FEE, AS DIRECTOR OF THE DIVISION OF MILK CONTROL OF THE DEPARTMENT OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK; JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND WILLIAM C. DODGE, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The appellant has heretofore served upon the counsel for the respondents a statement of jurisdiction, as required by the rules of this Court. No statement has been filed in opposition thereto.

The question involved in this case is the constitutionality of a provision of the New York Milk Control Law which permits the sale of bottled milk not having a well advertised trade name to stores in New York City and by stores to consumers at a price 1¢ per quart below the price at which milk having a well advertised trade name may be sold under similar circumstances. When the case was before this Court at the last term on an appeal from a decision of the District Court convened pursuant to Section 380 of Title 28 of the United States Code (Judicial Code, Section 266) denying the appellant's application for an interlocutory injunction and dismissing the complaint on the merits, the decision below was reversed and the case remanded, with direction that the application for an interlocutory injunction be heard and decided, the cause proceed to final hearing upon the pleadings and proofs, and the facts found and conclusions of law stated as required by Equity Rule 70½ (*Borden's Farm Products Company, Inc.* v. *Baldwin*, 293 U. S. 194). After a full hearing before a Special Master who made findings of fact and conclusions of law and recommended the granting of an interlocutory injunction in accordance with the prayer of the bill of complaint, the District Court again denied the injunction and dismissed the complaint upon the merits.

The question whether this statutory price differential is constitutional is of vital importance to the appellant and to other milk dealers in New York City, and is likewise of importance in the general administration of the Milk Control Law. The appeal is entitled to preferred and speedy disposition under Section 380 of Title 28 of the United States Code (Judicial Code, Section 266) and under the rules of this Court, and it is desirable that it be finally determined without unnecessary delay.

There is now pending before this Court on appeal from the New York Court of Appeals the case of *Mayflower Farms, Inc.* v. *Baldwin* (No. 349), which involves the constitutionality of so much of the statutory provision for the differential under attack as restricts the benefit of the differential to those dealers who have been continuously engaged in business since April 10, 1933. Since this appeal involves the constitutionality of the entire statutory provision for the differential, a decision of this Court in favor of the appellant would render the *Mayflower* case moot. Counsel for the appellant in that case have requested in their statement of jurisdiction that this Court should first review the narrower question there involved, but counsel for the respondent Commissioner of Agriculture and Markets in his statement opposing jurisdiction has requested that the two appeals be heard together. It is respectfully submitted that the latter course would conserve the time of the Court and make possible a fuller consideration of the related questions raised in the two cases, and would be in conformity with the usual practice of the Court.

It is, therefore, respectfully prayed that probable jurisdiction be found and that this appeal be advanced and set down for argument immediately ahead of the *Mayflower* case or at such other time as the Court shall direct.

Dated November 25, 1935.

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New York, N. Y.,
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